United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-1147

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United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

NICHOLAS BOTTA and LAWRENCE MESSINA,

Appellants.

APPELLANTS' BRIEF

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UNITED STATES COURT OF APPEALS
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- X

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- X

BRIEF OF APPELLANTS BOTTA AND MESSINA

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered against appellants on the 14th day of March, 1977 in the United States District Court for the Southern District of New York (Weinfeld, J.), sentencing each to a term of one year and one day on his plea of guilty to the first count in the indictment, the crime of conspiracy in violation of 18 U.S.C. 371, as charged in Count One of the indictment. Judge Weinfeld granted permission to appeal from his order denying appellant's motion to suppress evidence and information derived from electronic surveillance. Notice of appeal was duly served and filed.

ISSUES

1. Is an application in support of an electronic surveillance order sufficient that merely recites in conclusory terms that all gambling conspiracies are tough to crack, to establish that normal investigative techniques would be inadequate as required by statute?

2. Where an application for leave to electronically intercept telephone communications discloses the availability of more conventional investigatory methods, is the surveillance order thereby in violation of 18 U.S.C. 2851 (1)(c)?

STATEMENT OF FACTS

On the 11th day of June, 1975, United States District Court Judge Edmund L. Palmieri signed an order authorizing electronic surveillance of telephone numbers 860-0702 and 860-0704 located at 2433 Second Avenue, New York City, on grounds that there was probable cause to believe that evidence of gambling in violation of 18 U.S.C. 1955 could be obtained therefrom. More particularly, the order recites that "there is probable cause to believe that particular wire communications of DANNY KRAMER, ARTHUR SONNENSHEIN (a/k/a "SUNSHINE"), RITCHIE (LNU), and others as yet unknown concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will reveal the identities and roles of all participants in the illegal gambling business, the amounts of monies owed to or by bettors

and other participants in the gambling business, the distribution of contraband monies and records obtained by and used in the illegal gambling business, the methods of record-keeping and the meaning thereof, the methods of operation used by participants in the gambling business and the full nature and scope of the conspiracy involved therein." The order further recited that "normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if continued, or reasonably appear unlikely to succeed if tried." The authorization provided that the "interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained but shall continue until communications are intercepted which reveal the manner in which RICHARD ESPOSITO, ARTHUR SONNONSCHEIN (a/k/a "SUNSHINE"), ALEX NICHAS (a/k/a "ALEX THE GREEK"), DANNY KRAMER, RITCHIE (LNU), and others as yet unknown participate in the illegal gambling business, etc." The limitation imposed on the length of interception was "attainment of the authorized objective or, in any event, at the end of twenty (20) days from the date of this order, whichever is earlier." (1a-2a)* In support of the application were an affidavit of MICHAEL D. ABZUG, an Attorney of the United States Department of Justice (6a-12a), a letter from Edward T. Joyce, Deputy Chief, Organized Crime and Racketeering Section Criminal Division (13a-14a), an affidavit of WILLIAM BRADBURY, Jr., Special Agent, Federal Bureau of Investi-

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* Page numbers refer to Appellants' appendix

gation (15a-39a) and a letter of authorization from EDWARD H. LEVI, Attorney General of the United States (40a).

The affidavit of Special Agent Bradbury, recites that information was obtained from three informants, "referred to as Mr. A., Mr. B and Mr. C. Facts are set forth in the affidavit that these informants proved in the part to be reliable and their information resulted in arrests and convictions.

Specifically, it is alleged that Mr. A was the source of the following information:

> "Mr. A advised that on February 3, 1975 he had a telephone conversation with RITCHIE during which RITCHIE told him that ARTIE SUNSHINE had said that he was employed as a 'runner' in a gambling operation. Mr. A advised that 'runners' solicit bettors for gambling operations and meet bettors once a week to make payments on winning wagers and to make collections on losing wagers. Mr. A advised that he has worked with ARTIE SUNSHINE during the past several years as runners in the same gambling operation and that from this association he knows ARTIE SUNSHINE's true name to be ARTHUR SONNENSCHEIN who resides in Brooklyn and is employed by Saks Fifth Avenue Department Store.
> "On March 7, 1975, Mr. A provided the following information. Mr. A advised that he is aware of a sports code name 'Mr. Dixon.' Mr. A stated that since February of 1975 he has made daily telephone calls between 5:00 and 8:00 P.M. using the numbers 860-0702 and 860-0704 for the purpose of receiving 'line information' on sports activities and 'win-loss' figures. During the course of these conversations Mr. A would also place wagers on various sports events. These conversations would always be with one of three 'clerks' who identified themselves as RITCHIE, RONNY and DANNY. Mr. A advised that RITCHIE furnished him with the aforesaid telephone numbers to permit him to receive the above described information from the gambling operation known as 'Mr. Dixon.' "

The affidavit contains much corroboration of Mr. A's information, including investigation and surveillance to the extent of locating the operation at 2433 Second Avenue, New York City, and identifying DANNY KRAMER, RITCHIE, DAVID STEINBERG, ARTHUR SONNENSCHEIN, and RICHARD ESPOSITO as the members of the "Dixon" operation, with Richard Esposito at its head. The affidavit contains specific items of additional information furnished by Mr. A, through May 29, 1975 of an evidentiary nature, detailing further the "Dixon" operation. This includes reports of telephone calls made by Mr. A to the numbers for which authorization to electronically surveille was secured, examples of which, are as follows:

> "On May 5, 1975, Mr. A provided the following information: Mr. A said that he has called 860-0702 and 860-0704 every day for the past seven days and received 'line' information, won - lost figures and placed four wagers. During these calls he either spoke to 'Danny' or 'Ritchie'. He last called at 12:20 P.M. May 5, 1975.
>
> "On May 13, 1975 Mr. A provided the following information: Mr. A advised that since May 5, 1975 he has continued to call either 860-0702 or 860-0704 at least once daily for the purpose of collecting won-loss figures on his bettors and that he has spoken to either DANNY RITCHIE or third male voice with which he is not familiar. Mr. A said that RONNIE may still be clerking on the weekends but he hasn't spoken with him recently. Mr. A advised that his last call over 860-0704 occurred during the afternoon of May 13, 1975 and he received his 'won-loss' figures on his gamblers from DANNY.
>
> "On May 14, 1975, Mr. A provided the following information: Mr. A advised that he had received his 'won-loss' figures from the individual with the unfamiliar voice when he called 860-0704 during the evening of May 13, 1975.

"On May 29, 1975, Mr. A provided the following information: Mr. A advised that on May 28, 1975, between 6:00 P.M. and 8:00 P.M. he called 860-0704 and asked for 'RITCHIE'. A male voice answered no and identified himself as 'DICK' and gave Mr. A his 'won-loss' figures for the preceding day."

Mr. B the second informer, is alleged in the affidavit of Agent Bradbury to be the source of the following information:

"Mr. B stated that from November 1974 to January 1975 he has placed a number of wagers for horses or other sporting events by placing telephone calls to 860-0702 or 860-0704 and speaking to at least one or two individuals. Mr. B said that he knows that at least two individuals are taking his wagers over the telephone lines bearing the numbers 860-0702 or 860-0704 because of these individual's distinctive voices. Mr. B said that within the past week ARTHUR SONNENSCHEIN who he also knows as "Sunshine" told him that the "Dixon" gambling operation used the telephone lines having the numbers 860-0702 and 860-0704 to receive wagers from bettors and that he (SONNENSCHEIN) was employed by the "Dixon" operation as a "runner."

"On April 24, 1975, Mr. B provided the following information: Mr. B stated that ARTHUR SONNENSCHEIN told him that "Dixon", who runs the gambling operation, meets with his "runners" and "line men" at Manny's Lounge, 1201 Lexington Avenue after 8:00 p.m. on Tuesday nights to 'settle up." Mr. B said SONNENSCHEIN told him that two of the 'runners' who met with Dixon at Manny's Lounge to 'settle-up' are SONNENSCHEIN himself and 'ALEX THE GREEK.' "

The affidavit goes on to recite that surveillance was set up to corroborate this information, which it did, to the extent of identifying not only the members of the operation, but their home addresses and motor vehicles, as well.

The affidavit sets forth the following additional information from Mr. B:

"On May 13, 1975, Mr. B provided the following information: Mr. B advised that on the morning of May 13, 1975 he had a conversation with ARTHUR SONNENSCHEIN wherein SONNENSCHEIN told him that he was still a runner in the Dixon operation, that DICK ESPOSITO is 'still running the show' and that 'ALEX THE GREEK' is still a runner. SONNENSCHEIN further stated that ESPOSITO continues to meet with SONNENSCHEIN and (sic) at Manny's Lounge to settle up and that he (SONNENSCHEIN) uses 860-0702 and 860-0704 on a daily basis 'to get his figures.' "

The affidavit of Agent Bradbury recites the following information learned from Mr. C, the third informer:

"On May 6, 1975, Mr. C. provided the following information: Mr. C stated that for better than eight months he has known that a gambling business has been operating in Manhattan which is commonly referred to as the 'Dixon Operation'. Mr. C learned this from conversations with the participants in the operation. Mr. C said that within the past week ARTHUR SONNENSCHEIN told him that he is a 'runner' in the 'Dixon' operation and that the Dixon operation is a very large gambling business. Mr. C identified the surveillance photograph taken on April 16, 1975 of the unidentified male number one as RITCHIE who he said was currently the head clerk of the 'Dixon' operation. Mr. C stated that RITCHIE lives in New Jersey. Mr. C identified the surveillance photograph taken on April 14, 1975 of the unidentified male number two as DANNY KRAMER who is currently a clerk in the 'Dixon' operation and who lives in Manhattan. Mr. C said that he knows RITCHIE's and DANNY KRAMER's function in the "Dixon" operation because of conversation with them occurring as recently as within the past week. Mr. C further said that 'Dixon', the head of the operation is really RICHARD ESPOSITO. Mr. C says that he knows that 'Dixon' is RICHARD ESPOSITO from his past years of association with him in other gambling operations. Moreover, within the past week, DANNY told Mr. C. that 'Dixon' was RICHARD ESPOSITO. Mr. C also advised that within the past week ARTHUR SONNENSCHEIN told him that ESPOSITO is the boss of the operation and has the 'mob connection' for the operation. Mr. C further advised that RICHARD ESPOSITO owns a store on Second Avenue between 124th Street and 125th Street in New York, New York."

Finally, the affidavit of Agent Bradbury recites the following need for interception:

> "I know from my experience and that of other agents that most bookmaking operations dealing in sports and horse race gambling accept bets primarily on the telephone, many times assigning code names for the bettors making the wagers and the bookmakers accepting them. The only required personal contact between the bettor and bookmaker in these instances is when they 'settle up', that is, when they balance their account and any money owed at that time by one or the other is paid. These bets are recorded by the bookmaker accepting them on the telephone on a separate 'sheet' for each runner, who settles with the bettor. In addition, I know that many times the person who 'settles up' with the bettor is not the same person who receives the bet telephonically.
>
> "My experience and the experience of other agents have shown that gambling raids and searches of gamblers and their gambling establishments, have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offenses. I have found through my experience and the experience of other special agents who have worked on gambling cases that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers immediately, prior to or during a physical search, destroy them. Additionally, records that have been seized in the past gambling cases have generally not been sufficient to establish elements of a Federal offense because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activities and nature of the operation.
>
> "The informants referred to in this affidavit are unwilling to testify against RICHARD ESPOSITO, ARTHUR SONNENSCHEIN (a/k/a SUNSHINE), ALEX NICHAS (a/k/a ALEX THE GREEK), RITCHIE (LNU), DANNY KRAMER and others as yet unknown, involved in the gambling business, because of fear for their personal safety.
>
> "For the reasons enumerated in paragraphs 17-19, all normal avenues of investigation and prosecution have been exhausted or have been considered too risky to attempt."

On the 24th day of June, 1975, Judge Palmieri ordered the tape recordings of the intercepted wire communications to be sealed and kept in the custody of the Federal Bureau of Investigation. (41a-42a)

On the 10th day of July, 1975, United States District Court Judge Robert L. Carter signed a second and similar surveillance order, authorizing electronic interception of oral communications over telephone numbers 289-2579 and 289-2547 at 251 E. 123rd Street, New York, New York, 686-2138 and 686-2299 at 343 E. 30th Street, Apartment 3J, New York, New York, and public telephones 348-9822 and 831-9709 at the southeast corner of 81st Street and Lexington Avenue to intercept the telephone conversations of DANNY KRAMER, RITCHIE (LNU), ARTHUR SONNENSCHEIN, RICHARD ESPOSITO, KENNY (LNU) (believed to be KENNETH DAVIS), and others as yet unknown. (44a-53a)

In support of this second application was a second affidavit of MICHAEL D. ABZUG, Attorney of the United States Department of Justice, with annexed letters of authorization (54a-67a), as well as a second affidavit of Special Agent William Bradbury, Jr. (68a-110a)

This second affidavit of Bradbury recites that between June 11, 1975 through June 15, 1975, approximately seven hundred and twenty telephone communications pertaining to gambling were intercepted to and from the telephone numbered 860-0702 and 860-0704, covering $477,000 wagered on baseball

games and horse races. The affidavit recites that simultaneously surveillance was kept on the principals of the betting coup identified by Messrs. A B and C. Content of intercepted conversations is included in the affidavit. One of the interceptions revealed that the operation was going to use new numbers, 289-2689 and 289-2657, two of the numbers for which authorization to intercept was granted by Judge Carter. (83a) Surveillance disclosed 251 East 123rd Street as the location of the new numbers. In addition, Mr. A was told by a bettor that commencing June 16th, 1975, the Dixon Operation would commence to use the new numbers.

The second affidavit of Bradbury recites that Mr. C secured information that Danny Kramer would be taking bets over 686-2299 and 686-2138:

> "On April 29, 1975, Mr. C. furnished the following information:
>
> Mr. C said that DANNY KRAMER told him within the past week that he was a clerk with RITCHIE (LNU) in the operation and that he (DANNY KRAMER) could be reached at 686-2299.
>
> "On June 16, 1975, Mr. C furnished the following information: Mr. C said that DANNY KRAMER told him on June 16, 1975, that he is accepting wagers on horse racing and baseball sporting events at 686-2299 and 686-2138. (87a)

The affidavit of Agent Bradbury recites the following surveillance of Richard Esposito:

> "On June 15, 1975, surveillance conducted by a Special Agent of the Federal Bureau of Investigation revealed there are two telephone booths on the

> southeast corner of Lexington Avenue and 81st Street. This corner is located approximately one-half block from Manny's Lounge, 1201 Lexington Avenue, where RICHARD ESPOSITO has been observed to meet with the runners in the DIXON OPERATION to settle up."

The affidavit recites that the public telephones bear numbers 348-9822 and 831-9709. Observations are then detailed of RICHARD ESPOSITO using these public telephones, the probable cause for the application to wiretap these numbers.

The affidavit then concludes with similar allegations that conventional investigative would not be adequate in this type of gambling case.

On the 6th day of August, 1975, United States District Court Judge Charles E. Stewart ordered the tapes sealed and to remain in the custody of the Federal Bureau of Investigation.

As a result of the electronic surveillance, the telephone communications of appellants BOTTA and MESSINA were intercepted. They were indicted for conspiracy to commit the crime of gambling as defined in 18 U.S.C. 1955 and the substantive crime of violation of 18 U.S.C. 1955. The indictment charges the alleged role of appellants BOTTA and MESSINA, as follows:

The indictment charged appellants, among other defendants, with conspiracy and violation of 18 U.S.C. 1955, charging the alleged role of appellants, as follows:

"The defendants NICHOLAS BOTTA, LARRY MESSINA,

and JOHN YARMOSH, together and with others not named herein worked in a wireroom belonging to the 'Mr. White' unlawful sports gambling business. The defendants NICHOLAS BOTTA, LARRY MESSINA, JOHN YARMOSH, together with others not named herein would record and tally sports wagers received at the wireroom belonging to the 'Mr. White' unlawful sports gambling business. The defendants NICHOLAS BOTTA, LARRY MESSINA, JOHN YARMOSH, together with others not named herein would record and tally sports wagers received at the wireroom via telephone from the co-conspirator Danny Kramer and other unidentified runners, as well as accept the 'Dixon' operation's 'laid off' sports wagers. The defendants NICHOLAS BOTTA and JOHN YARMOSH would also collect money owed to the 'Mr. White' operation by the co-conspirator Danny Kramer as well as other unidentified runners who had transmitted wagers to the 'Mr. White' wireroom. Similarly, the defendants NICHOLAS BOTTA and JOHN YARMOSH would also pay money owed by the 'Mr. White' operation by the co-conspirator Danny Kramer as well as other unidentified runners who transmitted wagers to the 'Mr. White' wireroom."

The overt acts attributed to appellants were telephone conversations with co-conspirators Daniel Kramer on July 17, 1975 and on November 2, 1975.

On the 20th day of December, 1976, a hearing was conducted on appellants' motion to suppress all evidence derived from electronic surveillance, which was denied by Judge Weinfeld. (143a-153a).

POINT ONE

BOILER PLATE, CONCLUSORY LANGUAGE THAT CONVENTIONAL METHODS ARE NOT SUITED TO GAMBLING CASES RENDERS THE AFFIDAVIT IN SUPPORT OF THE ELECTRONIC SURVEILLANCE AUTHORIZATION INSUFFICIENT: MOREOVER, THE FACTS IN THE APPLICATION REFLECT THAT CONVENTIONAL METHODS WERE WELL SUITED TO THE INVESTIGATION OF THIS CASE.

18 U.S.C. 2518 requires that an application for an

order authorizing electronic surveillance contain:

> "(1)(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Although the affidavits of Agent Bradbury adopt statutory language and recite that other investigative procedures were not attempted, a reading of the facts in his applications contradicts his conclusions. Firstly, three informers, Messrs. A, B and C were used, who were able to identify the entire cast of characters in the "Dixon Operation" gambling enterprise. They were able to furnish sufficient information to enable Special Agents, through surveillance methods, to corroborate to the minutest detail, the facts concerning the "Dixon Operation" personnel. Indeed, by the time that application for the first electronic surveillance order was made, the case had effectively been solved. There certainly was no need for a second surveillance order. Indeed, there was no need for an initial application.

Judge Weinfeld, in his decision rejecting appellants' argument that no showing had been made that conventional investigative tools would not have sufficed, gave too much weight to the relatively minor role of the three informants in respect to the "Dixon Operation", rather than the detailed and damning quality information and evidence they supplied and could have continued to supply without need to resort to the extraordinary tool of wiretapping. Judge Weinfeld wrote in the decision:

> "Defendants further contend that the affidavits in support of the application were insufficient in that they did not set forth 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous' as required by 18 U.S.C, section 2518 (1) (c). However, the affidavits of Special Agent Bradbury stated in each case the reasons why other investigative procedures were likely to be fruitless. First, although the defendants stress that the government had received information from three informants, the fact remains that these informants were unwilling to testify for fear of their lives or personal safety and that without their testimony there was not nearly sufficient evidence to obtain convictions. In addition, none of the informants had access to the inner workings of the conspiracy, since two were merely bettors and one had formerly been a low-level participant in gambling operations. Second, most of the gambling transactions in question occurred over the telephone, making physical surveillance unproductive. Third, Agent Bradbury stated that in his experience the records of gambling operations are frequently incomprehensible to the uninitiated and are often destroyed upon the execution of search warrants. Under the circumstances set forth in the affidavits, the requirements of the statute were met."

However, a more careful examination of the affidavits submitted by Agent Bradbury contradict this finding.

Mr. A furnished information leading to the identification of every member of the "Dixon Operation" and his precise role before the electronic surveillance had commenced. He identified RITCHIE. He identified RONNY. He identified DANNY. He identified the location of the "Dixon Operation." Agent surveillance then identified every member of the enterprise, including their home addresses, their prior criminal records, the cars they drove.

Beyond this, Mr. A reported the content of his frequent telephone calls to the "Dixon Operation," which included conversations with "DANNY", "RITCHIE", and persons with whose voices he was not familiar and even conversations with RICHARD ESPOSITO, himself, the alleged head of the operation, who undoubtedly was the "DICK" with whom Mr. A spoke. Certainly, more conventional means of investigation suggested itself than electronic surveillance, even if it be argued that the information given by the informants was not sufficient. The agents could have tape recorded Mr. A's telephone conversations with members of the "Dixon Operation", and thus avoided the unnecessary intrusion upon the Constitutionally protected privacy of appellants, who admittedly were no part of the "Dixon Operation," and therefore were dragneted into this case only as a result the unnecessary interception of all telephone calls made to the "Dixon Operation." Indeed, from the facts set forth in the affidavit of Agent Bradbury, the Government had a duty to first try methods other than electronic surveillance. Section 2518 (1) (c) requires a statement in an application for permission to conduct electronic surveillance to recite why "other investigative procedures . . . appear to be unlikely to succeed if tried." Absent from this application was a statement why tape recording the telephone calls of Mr. A to the "Dixon Operation" were "unlikely to succeed" in producing the necessary evidence. Assuming arguendo that Mr. A was in fear of testifying, the

conversations could have been monitored by an agent on an extension telephone, thereby providing the necessary foundation testimony for their admission into evidence. The skipping of this investigative procedure that should have been apparent to Agent Bradbury and Assistant United States Attorney Abzug, invalidates both surveillance orders and require suppression of all evidence and information derived therefrom.

The affidavit of Agent Bradbury concerning the information supplied by Mr. B also suggests that the latter's telephone calls to the "Dixon Operation" should have been monitored before resort to court authorized electronic surveillance. Thus, Mr. B's telephone calls to the central plant were a second source for monitoring and securing additional evidence to make a case against the "Dixon Operation." However, it was not even tried.

In addition, the affidavit of Bradbury contains invaluable additional information from Mr. B that cried out for Government action, aside from electronic surveillance. Mr. B advised Bradbury that Richard Esposito "who runs the gambling operation, meets with his 'runners' and 'line men' at Manny's Lounge, 1201 Lexington Avenue after 8:00 p.m. on Tuesday nights to 'settle up.' " The information supplied by Mr. B virtually assured the success of a raid at "Manny's Lounge" . . . . after 8:00 p.m. on any Tuesday night." This would not be a chance raid, with opportunity for the destruction of evidence, but one

where success would almost be guaranteed.

The third witness, Mr. C was the source of the same information and could have assisted the Government by consenting to the monitoring of his telephone calls to the "Dixon Operation."

Indeed, in United States v Steinberg, 525 F.2d 1126 (2nd Cir., 1975), the Court wrote that boiler plate reference to statutory shibboleths was not sufficient to authorize electronic surveillance. The Court warned that "the Government will be well advised in the future to include a more detailed factual statement indicating the inadequacy of other investigative techniques." The Court upheld the wiretapping in that case since the record disclosed that it was necessary to uncover the supplier for a drug ring and noted that "on oral argument, appellant's could advance no logical alternative to wiretapping to ascertain the details of Steinberg's operation." In the case at bar, appellants can urge three informers, whose information was supplemented by patient surveillance, had furnished the details of the "Dixon Operation" and monitoring the phone calls of the informers and execution of a near full proof raid at Manny's Lounge would have been a satisfactory alternative to electronic surveillance.

Boiler plate allegations in statutory language are not sufficient to show the necessity for electronic surveillance. Wiretapping was upheld in United States v. Staino, 358 F. Supp.

852 (E.D. Pa., 1973), on a showing that normal investigative procedures would not have rooted out the source of counterfeit money. In United States v. Falcone, 364 F. Supp. 877 (N.J., 1973) a showing was made that electronic surveillance was necessary due to the unreliability of the informant as a witness and the large scale cocaine conspiracy afoot. Unlike the three informers in the case at bar, in United States v. Schwartz, 535 F.2d 160 (2nd Circ., 1976), the informer was not privy to the inner workings of the conspiracy and so the statutory foundation for use of that extraordinary investigatory tool was laid. In this case, the informers had given sufficient information concerning the principals of the "Dixon Operation", that surveillance produced unmistakeable identification of the targets of the investigation and the telephones of the informers were available for monitoring, without need for court ordered wiretapping. It must be noted that the informers were in constant telephone communication with the target personnel and Mr. B had even engaged the head of the operation, RICHARD ESPOSITO, in an incriminating conversation. Certainly, there was no insufficiency of available information that was relied on for justification in United States v. Daly, 535 F.2d 434 (8th Cir., 1976). Unlike the situation in United States v. Lanza, 356 F.2d 27 (Fla., 1972), the informers, supplemented by conventional surveillance, identified all of the members of the target conspiracy.

"Boiler plate recitation of the difficulties of gathering useable evidence in bookmaking . . . prosecutions is not a sufficient basis for granting a wiretap order. To hold otherwise would make Section 2518 (1)(c) and (3)(c) mere formalities." United States v. Kerrigan, 514 F.2d 35 (9th Cir., 1975). The failure to show why other investigative techniques would work is fatal to the validity of a wiretap order. United States v. Curreri, 388 F. Supp. 607 (Md., 1974)

Agent Bradbury in each application recites in conclusory language that conventional investigatory methods are not suitable for gambling operation investigation without descending to particulars, why in this case, they were contra-indicated. The same criticism directed to the rejected conclusory allegations in United States v. Kalustian, 529 F.2d 585 (9th Cir., 1976) is appropriate for this case: "The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view."

There is little doubt that electronic surveillance of a gambling operation could conceivably reveal the cast of characters dealing with the operation. Indeed, this is how

the names of appellants Botta and Messina found their way on the caption of this action. By intercepting the telephone communications of the "Dixon Operation," the telephone communications of appellants were also intercepted. The legality of the interception of their telephone communications is tested by the legality of the "Dixon Operation" wiretapping. The Fourth Amendment, and legislation in fulfillment of its purposes, protect people not places. Katz v. United States, 389 U.S. 347. (1967). However, the test is not whether electronic surveillance might, by chance, put the name of another prospective defendant in the caption of a criminal prosecution, but whether the primary investigation can be shown to be ineffective without electronic surveillance. The test is not whether it would be helpful. Undoubtedly, it would always be. The test is whether other methods would be effective. The record in the court below shows they would.

POINT TWO

APPELLANTS BOTTA AND MESSINA HEREBY ADOPT ANY AND ALL ARGUMENTS RAISED BY THE OTHER APPELLANTS TO THIS APPEAL AS APPLICABLE TO THEM

CONCLUSION

THE JUDGMENT OF CONVICTION IN THE COURT BELOW SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Yours, etc.,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of May ,19 77 at No. 1 St. Andrews PL., NYC

deponent servied the within Brief upon U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
12 day of May 197 7

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978